

**A Leftenan-Kolonel Harbajan Singh a/l Jagat Singh
 & Ors v Azmi bin Abdul Rahman**

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-01-79
OF 1999

B SHAIK DAUD, DENIS ONG AND HAIDAR JJCA
24 NOVEMBER 2000

**C *Constitutional Law* — Courts — Courts-martial — Procedure — Duty of judge-
advocate under r 103 of Armed Forces (Court-Martial) Rules of Procedure 1976 — Court-
martial bound to accept advice of judge-advocate on questions of law and procedure —
Power to convict on lesser charge — Whether sufficient to merely advise court-martial to
consider again for lesser charge and convict — Whether judge-advocate must stipulate what
other offences accused could be convicted —**

**D Three charges were originally preferred in the court-martial against
Captain Ramly bin Abdul Manaf ('Capt Ramly') under the Armed
Forces Act 1972 ('the Act'), who raised an objection against two of the
charges on ground of duplicity. It was noted accordingly that the
second charge should be an alternative to the first charge and the third
charge should then be the second charge. As against the respondent,
two charges were preferred; the first charge being a charge of abetting
Capt Ramly in the commission of the offence in the latter's first charge
(the abetment charge). The court-martial found Capt Ramly guilty
on the alternative charge and the second charge while the respondent
was found guilty on the abetment charge. The judge-advocate
disagreed that if Capt Ramly was not convicted on the first charge, the
court could not convict the respondent for abetment charge. The
judge-advocate then invoked his power under r 103(5) of the Armed
Forces (Court-Martial) Rules of Procedure 1976 ('the rules') and
advise the court-martial to reconsider their findings and for the latter
to invoke its inherent power to convict on any lesser charge. The
court-martial took the advice of the judge-advocate and re-
deliberated. The court-martial found the respondent not guilty on the
abetment charge, but guilty on the charge under s 87 of the Armed
Forces Act 1972 ('the Act') in line with the alternative charge found
against Capt Ramly. Subsequently, the court-martial made an order
dismissing the respondent from His Majesty's service. The respondent
complained that the judge-advocate had failed to direct the court-
martial 'what findings are, in his opinion, open to them', as provided
in r 103(5). Counsel for the respondent conceded that the above issue
was not canvassed before, but argued that he could do so before this
court as it involved a question of law.**

Held, dismissing the appeal with costs:

**I (1) There is a discretion in the appellate court to allow a point of law
to be raised on appeal when the point raised relates to jurisdiction
or illegality and is not merely technical. As the point raised relates
to jurisdiction and the facts are not in dispute, the court**

accordingly exercised its discretion and allowed the point to be argued (see p 320C–E).

- (2) Unless the court-martial has weighty reasons for differing with the judge-advocate, a court-martial is bound to accept the advice of the judge-advocate on all questions of law and procedure. The proceedings in a court-martial is akin to the proceedings in jury trials where r 103(4) imposes a duty on the judge-advocate to sum up the evidence and advise the court-martial upon the law relating to the case before the court-martial close to deliberate on their finding (see pp 322H–323A).
- (3) The judge-advocate had correctly advised the court-martial that it has the power under r 47 to convict the respondent on a lesser charge. Just like a jury trial, it is the duty of a judge-advocate to advise that on the evidence presented the respondent has committed an offence involving a lesser degree of punishment although he was not charged with it and what are the lesser offences open for the court-martial to consider. It is not sufficient to merely advise the court-martial to consider again for any lesser charge and to convict the respondent on the lesser charge (see p 323B–D).
- (4) The scheme of the armed forces legislation clearly demarcates the role of the court-martial as judges of fact and the role of the judge-advocate as judge of law. The judge-advocate acting under r 103(5) in advising the court-martial of its powers under r 47 to convict the respondent on a lesser charge without mentioning what other offences the respondent could have been convicted of was clearly a misdirection by way of non-direction (see p 323F–G). The court however agreed with the order made by the judge-advocate, though not with his reasoning (see p 323H).

Per curiam:

It was wrong for the court-martial to call on Capt Ramly to answer on both the first charge and the alternative charge. It should either be the first charge or the alternative charge. As Capt Ramly was found guilty on the alternative charge, then the abetment charge against the respondent could not stand as his charge is for abetment of the first charge against Capt Ramly (see p 321A–B). Although Capt Ramly was actually found guilty on the alternative charge, the respondent would in all probability fail in his action since r 47(2) clearly gives the power to the court-martial to convict the respondent on any lesser charge (see p 322E).

[Bahasa Malaysia summary]

Tiga pertuduhan telah pada asalnya dikemukakan dalam mahkamah tentera terhadap Kaptain Ramly bin Abdul Manaf ('Kapt Ramly') di bawah Akta Pasukan Bersenjata 1972 ('Akta tersebut'), yang telah

- A membangkitkan bantahan terhadap dua daripada pertuduhan-pertuduhan tersebut atas alasan penggandaan. Diperhatikan sehubungan itu bahawa pertuduhan kedua seharusnya menjadi suatu alternatif kepada pertuduhan pertama dan pertuduhan ketiga seharusnya dengan itu menjadi pertuduhan kedua. Terhadap responden pula, dua pertuduhan telah dikemukakan; pertuduhan pertama beliau merupakan pertuduhan bersubahat dengan Kapt Ramly dalam melaksanakan kesalahan dalam pertuduhan pertama terhadap Kapt Ramly ('pertuduhan bersubahat'). Mahkamah tentera mendapati Kapt Ramly bersalah atas pertuduhan bersubahat tersebut. Hakim tentera tidak bersetuju bahawa jika Kapt Ramly tidak disabitkan atas pertuduhan yang pertama, mahkamah tidak boleh mensabitkan responden atas pertubuhan bersubahat. Hakim tentera kemudian menggunakan kuasanya di bawah k 103(5) Kaedah-Kaedah Prosedur Pasukan Bersenjata (Mahkamah Tentera) 1976 ('kaedah-kaedah tersebut') dan menasihatkan mahkamah tentera supaya mempertimbangkan semula keputusan mereka dan untuk mahkamah tentera menggunakan kuasa sedia adanya ke atas mana-mana pertuduhan yang lebih ringan. Mahkamah tentera telah menerima nasihat hakim tentera dan mempertimbangkan semula. Mahkamah tentera telah mendapati responden tidak bersalah atas pertuduhan bersubahat, tetapi bersalah atas pertuduhan di bawah s 87 Akta Pasukan Bersenjata 1972 ('Akta tersebut') sejajar dengan pertuduhan alternatif yang diputuskan terhadap Kapt Ramly. Berikutan itu, mahkamah tentera telah membuat satu perintah memecat responden daripada perkhidmatan Duli Yang Maha Mulia Yang Di-Pertuan Agong. Responden mengadu bahawa hakim tentera telah gagal untuk mengarahkan mahkamah tentera 'apakah keputusan, menurut pendapatnya, terbuka kepada mereka', seperti mana yang diperuntukkan dalam k 103(5). Peguam bagi pihak responden telah bersetuju bahawa isu yang tersebut di atas telah tidak dikemukakan dahulu, tetapi berhujah bahawa beliau boleh melakukan sedemikian di hadapan mahkamah ini kerana ia melibatkan persoalan undang-undang.
- F
- G **Diputuskan**, menolak rayuan tersebut dengan kos:
- H (1) Terdapat budi bicara dalam mahkamah rayuan untuk membenarkan sesuatu perkara undang-undang dibangkitkan ketika rayuan apabila perkara yang dibangkitkan itu berkaitan dengan bidang kuasa atau kepenyalahan undang-undang dan bukan hanya bersifat teknikal. Oleh kerana perkara yang dibangkitkan berkaitan bidang kuasa dan fakta-faktanya tidak dipertikaikan, mahkamah sehubungan itu melaksanakan budi bicaranya dan membenarkan perkara itu dihujahkan (lihat ms 320C-E).
- I (2) Kecuali mahkamah tentera memberikan alasan-alasan yang kuat kerana tidak bersetuju dengan hakim tentera, mahkamah tentera dikehendaki menerima nasihat hakim tentera mengenai semua

persoalan undang-undang dan prosedur. Prosiding dalam mahkamah tentera sama seperti prosiding dalam perbicaraan-perbicaraan juri di mana k 103(3) mengenakan tugas ke atas hakim tentera untuk membuat kesimpulan mengenai keterangan dan menasihatkan mahkamah tentera mengenai undang-undang berkaitan dengan kes tersebut sebelum mahkamah tentera memutuskan untuk mempertimbangkan keputusan mereka (lihat ms 322H–323A).

- (3) Hakim tentera telah menasihatkan mahkamah tentera dengan betul bahawa ia mempunyai kuasa di bawah k 47 untuk mensabitkan responden atas pertuduhan yang lebih ringan. Seperti perbicaraan juri, adalah tugas hakim tentera untuk menasihatkan bahawa berdasarkan keterangan yang dikemukakan, responden telah melakukan kesalahan yang melibatkan tahap hukuman yang lebih rendah walaupun beliau tidak dituduh dengannya dan apakah kesalahan-kesalahan yang lebih ringan yang terbuka untuk dipertimbangkan oleh mahkamah tentera. Adalah tidak memadai untuk hanya menasihatkan mahkamah tentera untuk mempertimbangkan sekali lagi sebarang pertuduhan yang lebih ringan dan untuk mensabitkan responden atas pertuduhan yang lebih ringan itu (lihat ms 323B–D).

- (4) Skim perundangan pasukan bersenjata jelas membataskan peranan mahkamah tentera sebagai hakim-hakim fakta dan peranan hakim tentera sebagai hakim undang-undang. Tindakan hakim tentera di bawah k 103(5) dalam menasihatkan mahkamah tentera mengenai kuasanya di bawah k 47 untuk mensabitkan responden atas pertuduhan yang lebih ringan tanpa menyebut apakah kesalahan-kesalahan lain yang responden mungkin telah disabitkan adalah jelas merupakan satu salah-arahan melalui ketiadaan-arahan (lihat ms 323F–G). Mahkamah walau bagaimanapun bersetuju dengan perintah yang dibuat oleh hakim tentera, walaupun tidak dengan alasannya (lihat ms 323H).

Per curiam:

Adalah salah bagi mahkamah tentera untuk memanggil Kapt Ramly untuk menjawab bagi kedua-dua pertuduhan pertama dan pertuduhan alternatif. Oleh kerana Kapt Ramly telah didapati bersalah atas pertuduhan alternatif, maka pertuduhan bersubahat terhadap responden tidak boleh dipertahankan kerana pertuduhan beliau adalah kerana bersubahat terhadap pertuduhan pertama terhadap Kapt Ramly (lihat ms 321A–B). Walaupun Kapt Ramly didapati bersalah atas pertuduhan alternatif, responden akan dalam semua kebarangkalian gagal dalam tindakan beliau kerana k 47(2) dengan jelas memberikan kuasa kepada mahkamah tentera untuk mensabitkan responden atas sebarang pertuduhan yang lebih ringan (lihat ms 322E).]

A Notes

For a case on courts-martial, see 3(1) *Mallal's Digest* (4th Ed, 2000 Reissue) para 1426.

B Cases referred to

A-G for the Straits Settlement v Pang Ah Yew [1934] MLJ 184 (refd)
Central Bank of India, Ltd v Guardian Assurance Co Ltd [1936] MLJ 131 (refd)

Hassan & Anor v Wan Ishak & Ors [1961] MLJ 45 (refd)
Mejar Ali Zaman bin Ali Hassan v Capt Abdul Kadir & Anor [1989] 3 MLJ 32 (refd)

Mejar Sundaraj v Lt Kol Abdul Aziz bin Hanafi & Anor [1987] 2 MLJ 474 (refd)
S Mariappan v Government of Malaysia [1983] 2 MLJ 340 (refd)

D Legislation referred to

Armed Forces Act 1972 ss 61(a), 77(a), 87, 88, 105, 120(2)
Armed Forces (Court-Martial) Rules of Procedure 1976 rr 47(2), 103(3), (4), (5)

E Appeal from: Civil Suit No S1-21-08 of 1991 (High Court, Kuala Lumpur)

Ahmad Kamal bin Mohd Shahid (Senior Federal Counsel, Attorney General's Chambers) for the appellants.

Karpal Singh (*Karpal Singh & Co*) for the respondent.

F Haidar JCA. (delivering judgment of the court): The respondent, as the plaintiff in the court below, filed a writ action against the appellants, as defendants, seeking for the following orders:

- G** (1) a declaration that the plaintiff's conviction and dismissal from His Majesty's service by the court-martial, Kuching, Sarawak on 21 January 1988 is wrong in law and null and void;
- (2) a declaration that the plaintiff is still an officer of the Armed Force Malaysia holding the rank of Major;
- (3) an order that the plaintiff be paid all salaries, allowances and other benefits to which the plaintiff is entitled since 21 January 1988;
- H** (4) damages for unlawful dismissal;
- (5) interest;
- (6) costs; and
- (7) any further relief deemed fit and proper by this honourable court.

I The respondent succeeded in the court below and order in terms of prayers (1), (2), (3), (5) and (6) was accordingly granted. Hence this present appeal before us against the judgment of the learned judge.

In this appeal there is only one ground for us to consider, that is, the interpretation of r 103(5) of the Armed Forces (Court-martial) Rules of Procedure 1976 ('the Rules') relating to the general duties of the judge-advocate in respect of court-martial proceedings under Part XIV of the Rules.

It was conceded by Mr Karpal Singh, counsel for the respondent, that the issue of the interpretation of r 103(5) of the Rules was not canvassed before the learned judge but he argued that he could do so before us as it involved a question of law, and it was a matter for the discretion of this court. Counsel for the appellants objected.

We agree that generally the appellate courts are reluctant to allow points of law or issues to be raised when they were not raised at first instance (see *A-G for the Straits Settlement v Pang Ah Yew* [1934] MLJ 184, *Central Bank of India, Ltd v Guardian Assurance Co Ltd* [1936] MLJ 131, *Hassan & Anor v Wan Ishak & Ors* [1961] MLJ 45. However, there are decided cases to show that there is a discretion in the appellate court to allow a point of law or issues not otherwise raised at the court below to be raised on appeal. The appellate court would exercise its discretion when the point raised relates to jurisdiction or illegality and not merely technical. In this respect, Abdul Hamid FJ (as he then was) in *S Mariappan v Government of Malaysia* [1983] 2 MLJ 340 at p 342 said:

In the present case the facts are not in dispute. The point raised cannot be said to be merely technical but is related to jurisdiction to be determined by reference to certain provisions of the constitution and Service Regulations.

As we are of the view that the point raised relates to jurisdiction and the facts are not in dispute, we accordingly exercised our discretion and allowed the point or issue to be argued before us.

Mr Karpal Singh could only rely on this ground as he conceded to the submission of counsel for the appellants that the learned judge got confused on the charges preferred against the respondent and the other accused (Captain Ramly bin Abdul Manaf) in their joint trial before the court-martial. The confusion arose in this way.

Three charges were originally preferred against Captain Ramly bin Abdul Manaf ('Capt Ramly') namely, under ss 61(a), 87 and 77(a) of the Armed Forces Act 1972 ('the Act'). As against the respondent, two charges were preferred namely, under ss 61(a) and 88 of the Act. Before their pleas were taken, counsel for Capt Ramly raised an objection in respect of charges under ss 61(a) and 87 of the Act on ground of duplicity. The President of the court-martial agreed and noted accordingly that the second charge should be an alternative charge to the first charge and the third charge should then be as the second charge.

At the end of the prosecution case, the court-martial found Capt Ramly had a case to answer on the first charge as well as the alternative charge and the second charge. We pause here to say that in our opinion it was wrong for the court-martial to call on Capt Ramly to answer on both the first charge and the alternative charge. It should be either the first charge or the

- A alternative charge. Anyway this issue is not for our consideration as Capt Ramly is not before us. In respect of the respondent, the court-martial found there was a case for him to answer on the first charge but not on the second charge and acquitted and discharged him on the second charge.

- B At the end of the defence case, the court-martial found Capt Ramly guilty on the alternative charge and the second charge. As for the respondent, he was found guilty on the first charge. Herein lies the confusion. As Capt Ramly was found guilty on the alternative charge, then the charge against the respondent could not stand as his charge is for abetment of the first charge against Capt Ramly.

- C It seemed that the judge-advocate wrongly heard the judgment pronounced by the court-martial. According to the judge-advocate he wrongly heard that Capt Ramly was convicted on the first charge. The judge-advocate apologized to the court-martial. When the court-martial adjourned to deliberate on the sentence, the President of the court-martial confirmed with the judge-advocate that Capt Ramly was only convicted on the alternative charge and he was acquitted on the first charge. In view of this, the judge-advocate then invoked his power under r 103(5) which reads:

- E If, when the court announces a finding of guilty, or a special finding under either s 114 of the Act or r 81(3), the judge-advocate is of the opinion that such finding or special finding is contrary to the law relating to the case, he shall once more, but not more than once more, advise the court what *findings* are, in his opinion, *open to them*. The court shall then reconsider their finding in closed court. The record of the proceedings relating to such reconsideration shall be in the form set out in the 13th Sch to these Rules. (Emphasis added.)

- F It would be appropriate, in our view, to reproduce the advice the judge-advocate gave to the court-martial:

I disagree on the point that if Captain Ramly is not convicted on the first charge, that is, fraudulently misapplying public property, then the court cannot convict accused too, Major Azmi on first charge of abetting Captain Ramly for fraudulently misapplying the said property.

- G Since Captain Ramly has been acquitted on this fraudulent misapplication of the said property, therefore the abetting charge on the said Major Azmi should be dropped

Anyway the court has inherent power to consider again for any lesser charge and under RP47 the court has the power to convict the accused on any lesser charge.

- H Therefore I would like to direct the court to re-deliberate once more on this point. Thank you.

- I The court-martial took the advice of the judge-advocate and re-deliberated. Subsequently, the court-martial found the respondent not guilty on the first charge, but guilty on the charge under s 87 of the Act in line with the alternative charge found against Capt Ramly. The court-martial gave the opportunity to counsel for the respondent to amend his mitigation before passing sentence. Counsel for the respondent made slight amendments in

line with the new finding. After due deliberation, the court-martial made an order dismissing the respondent from His Majesty's service.

It would appear that the learned judge in the court below was not properly appraised of the conflicting charges before the court-martial by counsel for both parties. We hope we have set out with some clarity on the conflicting charges earlier on in this judgment. It would then be relevant to quote his Lordship's finding:

... I agree that on the ingredients as contained in the charge under s 87, if substantiated, would constitute an offence. But then, as here, the principal offender was acquitted and with regard to the charge against the plaintiff, the words 'telah membantu (abetted)' as specified in the charge under s 61(a) are being repeated in the charge under s 87.

In order to succeed against the plaintiff under s 87, the prosecution must prove the following:

- (i) there must be a finding of guilt against the principal offender (Captain Ramly).
- (ii) That the plaintiff aided and abetted Captain Ramly in committing the alleged offence.

This the prosecution had failed to prove as evidenced by an acquittal of Captain Ramly. As such, the charge against the plaintiff under s 87 could not stand. In this regard, I do not think r 47(2) can assist the prosecution.

With respect, had it been brought to the attention of the learned judge that Capt Ramly was actually found guilty on the alternative charge, the respondent (minus the benefit of r 103(5)) would in all probability fail in his action. Rule 47(2) clearly gives the power to the court-martial to convict the respondent on any lesser charge.

Be that as it may, the issue for our consideration is the effect of r 103(5) of the Rules in the proceedings before the court-martial.

We first need to examine the role of a judge-advocate, vis-a-vis the court-martial, within the provision of the Act and the Rules.

Section 120 of the Act makes provisions as to the exercise by a judge-advocate of his functions at a trial by a court-martial. Section 120(2) of the Act provides for Rules of Procedure as to the effect of advice or rulings given to a court-martial by a judge-advocate on questions of law. Rule 103 of the Rules sets out the general duties of a judge-advocate. Quite apart from r 103(5) we should consider also r 103(3) which reads:

On the assembly of the court, the judge-advocate shall advise the court of any defect in the constitution of the court or in the charge sheet, and during the trial he shall advise the court upon all questions of law and procedure which may arise. The court shall accept his advice on all such matters unless they have weighty reasons for not doing so, shall be recorded in the proceedings.

It would appear that unless the court-martial have weighty reasons for differing with the judge-advocate, a court-martial is bound to accept the advice of the judge-advocate on all questions of law and procedure. The reason for this provision is obvious. The members of a court-martial are laymen in so far as the law is concerned (see s 105 of the Act) and it is then

- A the legal duty of a judge-advocate to advise the court-martial on all questions of law and procedure. In our view, the proceedings in a court-martial are akin to the proceedings in jury trials where r 103(4) imposes a duty on the judge-advocate to sum up the evidence and advise the court-martial upon the law relating to the case before the court-martial closes to deliberate on their findings (see *Mejar Sundaraj v Lt Kol Abdul Aziz bin Hanafi & Anor* [1987] 2 MLJ at p 477).
- B

- C We will now proceed to consider the effect of r 103(5) of the Rules vis-a-vis the advice of the judge-advocate to the court-martial. In our view, the judge-advocate had correctly advised the court-martial that it has the power under r 47 to convict the respondent on a lesser charge. However, the complaint here is that the judge-advocate had failed to direct the court-martial 'what findings are, in his opinion, open to them', as provided in r 103(5). In other words, just like a jury trial, it is the duty of the judge-advocate to advise that on the evidence presented, the respondent has committed an offence involving a lesser degree of punishment although he was not charged with it, and what are the lesser offences open for the court-martial to consider. It is not sufficient to merely advise the court-martial to consider again for any lesser charge and to convict the respondent on the lesser charge. We say so for the reason that the word 'findings' in r 103(5) is in the plural. Mr Karpal Singh submitted that the failure of the judge-advocate to comply strictly with the provisions of r 103(5) amounted to a non-direction and this had caused injustice to the respondent. To that extent, Mr Karpal Singh submitted that the point or issue is one of jurisdiction and the learned judge was correct (though for different reasons) to make the order in favour of the respondent.
- D
- E

- F We agree that there are merits in the submission of Mr Karpal Singh. In our view the scheme of the Armed Forces legislation clearly demarcates the role of the court-martial as judges of fact and the role of the judge-advocate as judge of law. In our view, the judge-advocate acting under r 103(5) in advising the court-martial of its powers under r 47 to convict the respondent on a lesser charge without mentioning what other offences the respondent could have been convicted of was clearly a misdirection by way of non-direction (see *Mejar Ali Zaman bin Ali Hassan v Capt Abdul Kadir & Anor* [1989] 3 MLJ 32 at p 34.)
- G

Though we do not agree with the reasons of the learned judge, we however, agree with the order that he made but for the reasons as stated by us.

- H The appeal was accordingly dismissed with costs. The order of the learned judge affirmed.

Appeal dismissed with costs.

Reported by Wong Ee Lynn

I